No. 71-16

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANTS

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIFF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, AND RICHARD A. FALK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the three-judge district court (J. App. 1a-28a)[1] and the opinion of the dissenting Judge (J. App. 35a-59a) are reported at 325 F. Supp. 620.

[1] "J. App." refers to the Appendix to the Jurisdictional Statement.

JURISDICTION

The judgment of the three-judge district court (J. App. 60a) was entered on April 13, 1971. The notice of appeal (J. App. 62a) was filed on May 3, 1971. On May 11, 1971, the district court granted a stay of its judgment until June 10, 1971 (App. 92), and on June 10, 1971, granted a further stay (App. 93) pending decision on appeal. This Court noted probable jurisdiction on January 10, 1972 (App. 94). The jurisdiction of this Court rests upon 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether Section 212(a)(28)(D) and (G)(v) and Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a)(28)(D) and (G)(v), 1182(d)(3)(A)), which provide that certain aliens shall be excluded from entry into the United States unless the Attorney General, in his discretion, waives inadmissibility, are unconstitutional on the ground that they deprive American citizens, who wish to hear in person an alien excluded under those provisions, of freedom of speech under the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 212(a) of the Immigration and Nationality Act of 1952 provides in pertinent part:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (28) Aliens who are, or at any time have been, members of any of the following classes:
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> * * * * *
>
> (D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism or the establishment in the United States of a totalitarian dictatorship * * *
>
> * * * * *
>
> (G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching * * * (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;
>
> * * * *

Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952 provides in pertinent part:

> Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) * * * may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General * * *.

* * * *

STATEMENT

Appellee Ernest Mandel is a Belgian citizen and resident of Brussels (J. App. 3a). He is a professional journalist, editor-in-chief of the Belgian Left Socialist weekly publication, *La Gauche* [*The Left*], and the author of the two-volume work *Marxist Economic Theory* (App. 25). Although not a member of the Communist Party, Mandel characterizes himself as a "revolutionary Marxist" (App. 61) and is "an Orthodox Marxist of the Trotskyist School" (J. App. 3a); he advocates the economic, international and governmental doctrines of world communism (J. App. 4a-5a).

On September 8, 1969, Mandel applied to the American consul in Brussels, Belgium, for a nonimmigrant visa to enter the United States and remain for

six days, during which he would participate in a conference on "Technology and the Third World" at Stanford University (J. App. 5a-6a; App. 40). On October 22, 1969, after several universities and other institutions in this country invited him to lecture and participate in various conferences, Mandel filed another visa application with a more extensive itinerary (J. App. 6a; App. 44).

On October 23, 1969, the American consul in Brussels orally advised Mandel that his visa application of September 8th had been refused; the consul confirmed this in writing on October 30, 1969 (J. App. 6a; App. 13). The consul's letter informed Mandel that he was ineligible for a visa under Section 212 (a)(28) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a)(28)), a copy of which was enclosed. The consul referred to provisions providing, in part, that aliens who "advocate the economic, international, and governmental doctrines of World communism" and aliens "who write or publish * * * any written or printed matter * * * advocating or teaching * * * the economic, international, and governmental doctrines of world communism" shall be ineligible to receive a visa and shall be excluded from admission into the United States. Section 212(a)(28)(D) and (G)(v). The letter also explained that a request for a waiver of ineligibility, which the consul had submitted pursuant to Section 212(d)(3)(A). (8 U.S.C. 1182(d)(3)(A)) had likewise been refused. Under that provision, the Attorney General may in his discretion direct that a visa be granted after receipt "of a recommendation by the

Secretary of State" that an "alien be admitted temporarily despite his inadmissibility."[2] In conclusion, the consul informed Mandel that a second request for waiver, which had been forwarded after Mandel filed his second visa application on October 22, was currently pending. (App. 13-14).

With respect to Mandel's original visa application on September 8, 1969, the Secretary of State initially declined to recommend that the ineligibility provision be waived. The Attorney General had granted Mandel such a waiver in 1962 to enter the country as a working journalist (App. 43). He had been granted another waiver when he came here in 1968 to lecture (App. 43). The Secretary found that although both of the waivers that allowed Mandel to come here had been conditioned upon Mandel's conforming to the itinerary and limiting his activities to the purposes set forth in his visa applications, he had engaged in activities beyond the stated purposes of his trip in 1968 (App. 21-22), including raising money for French students who had been convicted during the rebellion that occurred there in May 1968 (App. 29, 47).

Mandel later assured the American consul that he would conform to the itinerary and purposes set forth in his October 22 visa application and would not solicit money for any political causes (App. 29). The Secretary, in view of Mandel's statement and

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[2] The consul's letter noted that Mandel had been granted waivers under this provision on his prior visits to this country in 1962 and 1968 (App. 14).

the Department of State's opinion that in 1968 Mandel may not have been fully aware that he was required to limit his activities to those stated in his itinerary, recommended to the attorney General that Mandel's ineligibility be waived (App. 43). However, the Attorney General refused to grant the waiver and so notified Mandel's attorney on February 13, 1970; stating that on Mandel's last visit to this country his activities "went far beyond the stated purposes of his trip and represented a flagrant abuse of the opportunities afforded him to express his views in this country" (App. 68).

On March 19, 1970, Mandel, joined by the other appelles, who are United States citizens,[3] instituted this action against the Attorney General and the Secretary of State, claiming that the statutory provisions under which Mandel had been excluded are unconstitutional and that their application to Mandel was arbitrary and unreasonable. Specifically, the American plaintiffs argued that Mandel's exclusion violated the First Amendment because it deprived them of the opportunity to hear him speak and to debate with him in person in the United States, and that Section 212(a)(28) of the Immigration and Nationality Act of 1952 is therefore unconstitutional on its face and as applied. Mandel and the other plaintiffs also claimed that the Act denied equal protection of the law by excluding leftists but not rightists,

[3] These appellees are persons who invited Mandel to speak, or who were to participate in programs with Mandel or who wished to have Mandel visit their university or group (App. 10).

that the Act violated the due process clause by failing to provide standards for the exercise of the Secretary's and the Attorney General's discretion with respect to waiving ineligibility, and that the Attorney General acted arbitrarily in refusing to accept the Secretary's recommendation that Mandel be admitted temporarily. Plaintiffs sought an injunction against the operation of these provisions and a declaratory judgment. A three-judge district court was convened pursuant to 28 U.S.C. 2282.

The district court, with one judge dissenting, held that although Mandel had no individual right to enter the country,[4] "the citizens of the country [have a right under the First Amendment] to have the alien enter and to hear him explain and seek to defend his views" (J. App. 22a-23a).[5] In the court's view, an alien could be excluded for advocating communism only if this amounted to "incitement or conspiracy to initiate presently programmed violence" (J. App. 24a), but where a prospective audience in this country awaits an alien, he cannot otherwise be refused a visa on the basis of his political affiliations or philosophy—neither the Executive nor Congress has any such discretion to exercise (J. App. 24a-25a). The court therefore issued a preliminary "injunction against the defendants' implementing and enforcing Sections 212(a)(28) and 212(d)(3)(A)

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[4] The district court stated that appellees had not argued that Mandel did not fall within Section 212(a)(28). See J. App. 8a.

[5] Appellees introduced affidavits with exhibits; the government introduced no evidence. The court decided the case on appellees' motion for a preliminary injunction (J. App. 3a).

* * * so as to deny plaintiff Mandel admission to the United States as a nonimmigrant visitor" and a "declaratory judgment that Section 212(a)(28) is invalid and Section 212(d)(3)(A) is inoperative so far as they have been invoked to find plaintiff Mandel ineligible for admission * * *" (J. App. 28a).[6]

Judge Bartels dissented on the basis that although the majority recognized "the sovereign power to exclude in the interest of self-preservation, they subordinate this interest to the First Amendment interest by applying standards invoked exclusively to strictures upon speech by American citizens and strictures upon the right of American citizens to hear other American citizens" and, in so doing, the "majority has ignored the crucial fact that [Section 212(a)(28)] serves the important objectives of (1) national security and (2) foreign policy * * *" (App. 36a). The dissent further noted that these provisions likewise do not purport to ban the espousal of world communism by any citizen in the United States, nor do they seek to ban the importation of books, articles, or pamphlets written by Mandel[7] or

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[6] The court did not pass on appellees' other contentions that the Attorney General arbitrarily refused to waive Mandel's exclusion, that the Act violated the due process clause because it supplied no standards for the exercise of the Attorney General's discretion to waive exclusion, and that the Act denied Equal Protection of the laws.

[7] Mandel's works—*Marxist Economic Theory, An Introduction To Marxist Economic Theory* and *The Marxist Theory of the State*—are sold and distributed in the United States (App. 54, 87).

any other alien expressing the doctrines that Mandel desired to lecture upon or debate about in the United States.[8]

SUMMARY OF ARGUMENT

A.

After enacting legislation in 1875 to bar the entry of certain aliens, Congress in 1903 expanded the classes of aliens ineligible for admission to include anarchists or persons who believe in overthrowing the government of the United States by force. Act of 1903, Section 2, 32 Stat. 1213, 1214. Further legislation followed with respect to subversive aliens in 1940, and, in 1950, after years of extensive study and numerous reports by Congressional Committees, Congress determined that aliens who advocated the economic, international and governmental doctrines of world communism should be ineligible for entry into the United States. Act of 1950, 64 Stat. 987, 1006. There is no question that these provisions, as carried forward in the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28)(D) and (G)(v),

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[8] The speech by Mandel, entitled *Revolutionary Strategy In the Imperialist Countries* originally scheduled to be presented at the conference sponsored by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference on November 29, 1969, on the theme of "Agencies of Social Change; Towards a Revolutionary Strategy for Advanced Industrial Countries," was subsequently tape recorded by Mandel and sent to this country where it was presented to an audience of 1,200 persons. The speech was also published by the Pathfinder Press, Inc. of New York in 1970 for distribution (App. 51; J. App. 3a).

rendered Mandel ineligible for a nonimmigrant visa to enter this country (J. App. 8a).[6]

B.

Ever since there have been nation states, it has been recognized that the power to exclude or admit foreigners is inherent in sovereignty. And ever since the question first arose, the Court has affirmed this ancient maxim of international law and held that the formulation of policies with respect to which aliens may enter the United States is entrusted exclusively to the Congress. These are policies that are peculiarly concerned with the political conduct of government, touching on foreign relations and national security. In decisions stretching over a period of nearly one hundred years, the Court has never departed from or modified the principle that Congress has plenary power to control the admission of aliens and that under the Constitution these are matters beyond the concern or competence of the Judiciary.

C.

These decisions are controlling here. The guarantee of freedom of speech in the First Amendment does not confer any right on an individual in this country to compel the admission of aliens that Congress has determined to be ineligible for entry. To be sure, exclusion of an alien precludes people here from meeting him face-to-face in this country. But

[6] The district court did not pass on appellees' contention that the Attorney General arbitrarily refused to exercise his discretion, see note 6, *supra*.

that is the inevitable consequence anytime any alien is denied entry. And in the host of cases dealing with the exclusion of aliens, the Court must have been aware of this self-evident fact when it upheld, against various constitutional challenges, Congress' exclusive power to prescribe the terms and conditions for admission. Nor is this case any different because here the alien was denied entry on the basis of his adherence to the doctrines of communism. Since the beginning of this century, Congress has denied admission to certain aliens because of their political philosophy or affiliations; and in each such case that has come before the Court, including cases dealing with aliens who were only past adherents to communism, Congress' plenary power in this area has been sustained.

D.

There is no reason for the Court to depart from these firmly-established principles regarding Congress' control over the admission of aliens. Congress' exclusion of aliens such as Mandel does not implicate any First Amendment rights of appellees. In *Zemel* v. *Rusk*, 381 U.S. 1, this Court rejected a challenge under the First Amendment to the Secretary of State's refusal to validate the passport of an American citizen for travel to Cuba. The Court held that the First Amendment simply was not involved since any inhibition was on action, not speech. The same is true here.

Action, not speech, is being regulated—the action of an alien, who has no personal First Amendment

right to come to this country and speak, as appellees themselves recognize. Moreover, the statute in question in no way restrains or inhibits appellees from speaking or publishing: what they have said or written, the people they have associated with and the organizations they have joined, are not related in any way to the exclusion of Mandel under Section 212 (a) (28).

That statute is an expression of United States foreign policy and is also based on considerations of national security. Congress had adequate grounds for enacting it after years of extensive investigation of the world communist movement. By denying this country's hospitality to alien communists, the statute expresses to the rest of the international community this country's opposition to the communist movement and serves as a lever for negotiating reciprocal immigration privileges with other nations. If these policies should be changed, it must be done through international diplomacy or new legislation.

Moreover, since Congress perceived a danger to this country from alien adherents to world communism, it was not limited to denying admission only to those alien communists who advocate and actively seek violent overthrow of the United States government. In light of difficulties of investigation and proof, as well as delicate questions regarding the propriety of the United States investigating residents of foreign countries in their homelands, Congress was entitled to decline to accept the burden that such a classification would entail.

As this Court has held from the outset, controlling the admission of aliens is entrusted exclusively to Congress. In validly exercising its authority here, Congress did not abridge appellees' freedom of speech. The First Amendment does not confer upon appellees the right to determine what aliens should be permitted to enter the country.

ARGUMENT

I. This Case Is Governed by the Long-Line of Decisions of This Court Holding that the Power to Exclude Aliens Is Inherent in Sovereignty, Necessary for Maintaining Normal International Relations and for Defending Against Foreign Dangers, and that Under the Constitution Formulation of Policies Regarding the Admission of Aliens Is Entrusted Exclusively to Congress

The only question presented by this case is whether Congress' exclusion of aliens such as Mandel violates the First Amendment because people in this country may wish to hear such aliens in person. The court below did not pass on appellees' further contentions regarding the Attorney General's discretion to waive exclusion.[10]

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[10] See note 6, *supra*. The district court stated that "the Government is without any power to act in the area defined by [Section 212] (a) (28) and the presence or absence of procedural due process in the attempted administration of subsection (d) (3) [the waiver provision] becomes irrelevent" (J.App. 26a).

A. *For Nearly a Century Congress Has Exercised Its Plenary Authority to Determine What Aliens Should Be Allowed to Enter the Country*

After a century of unimpeded alien migration to the United States, Congress in 1875 established grounds upon which aliens might be refused entry,[11] and, seven years later, enacted the first general immigration statute. Act of August 3, 1882, 22 Stat. 214. Further legislation soon followed,[12] including a general revision of the immigration laws in 1903 that enlarged the classes of aliens ineligible for admission to include, among others, "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." Act of March 3, 1903, Section 2, 32 Stat. 1213, 1214. In 1918, after another general revision of the immigration laws,[13] Congress expanded the provisions for excluding subversive aliens. Act of October 16, 1918, 40 Stat. 1012.[14]

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[11] Act of March 3, 1875, 18 Stat. 477, barring convicts and prostitutes. See generally S. Rep. No. 1515, 81st Cong., 2d Sess. 43-65 (1950); and 1 Gordon & Rosenfield, *Immigration Law and Procedure* § 1.2 (1967 ed.).

[12] See 1 Gordon & Rosenfield, *supra*.

[13] Act of February 5, 1917, 39 Stat. 874.

[14] Included were "aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States * * *."

The Alien Registration Act of 1940, 54 Stat. 670, 673, amended the Act of 1918 to bar the entry not only of aliens who presently advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States government, but also aliens who at any time had so advocated or belonged to such organizations. In *Harisiades* v. *Shaughnessy*, 342 U.S. 580, this Court sustained the constitutionality of that Act, which had been invoked to deport a resident alien who had formerly belonged to the Communist Party.[15]

Ten years later, after extensive investigation and numerous reports by Congressional Committees,[16] Congress passed the Internal Security Act of 1950, 64 Stat. 987, "in order to strengthen the provisions of [the 1918] act which relate to the exclusion * * * of subversive aliens." H. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950). The 1950 Act included certain communists among the class of excludable aliens and dispensed with the requirement of the 1940 Act of finding in each case, with respect to members of the Communist Party, that the Party did in fact advocate violent overthrow of the government.[17] (Section 22 of the Act, 64 Stat. 1006). After further hear-

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[15] The grounds for deportation under the Act were essentially the same as those for barring initial entry. Compare Section 20, 54 Stat. 671, with Section 23, 54 Stat. 673.

[16] See *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94-95 n. 37, citing many of the committee reports issued during this period dealing with communism.

[17] See *Galvan* v. *Press*, 347 U.S. 522, 529.

ings,[18] these provisions were carried forward in the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. 1182.

Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(28)(D) and (G)(v)) is thus derived directly from the Internal Security Act of 1950.[19] Under these provisions, aliens are ineligible to receive visas and are excluded from admission into the United States if they "advocate the economic, international, and governmental doctrines of World communism," [20] Section 212(a)(28)(D), or if they write or publish material so advocating, Section 212(a)(28)(G)(v).[21] However, the Immigration and Nationality Act, as had the Internal Security Act of 1950,[22] provided an

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[18] See Joint Hearings on S. 716, H.R. 2379 and H.R. 2816 before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess. (1951).

[19] See H. Rep. No. 1365, 82d Cong., 2d Sess. 137-138 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952).

[20] Section 101(a)(40), 8 U.S.C. 1101(a)(40), provides:

> The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist political movement.

[21] Senators Humphrey and Lehman, the principal opponents of the 1952 Act in the Senate, proposed a substitute bill, S. 2842, 82d Cong., 2d Sess., but with respect to Sections 212(a)(28)(D) and (G)(v), the provisions of the Humphrey-Lehman bill and of the bill subsequently enacted, were the same. 98 Cong. Rec. 5620 (1952).

[22] See 64 Stat. 1007.

exception to the exclusion provisions in Section 212 (a) (28) for temporary admissions of the diplomatic officers and, upon a basis of reciprocity, other representatives of foreign governments and their families. Section 212 (d) (2).

Also, with respect to an alien excludable under Section 212 (a) (28), the Attorney General in his discretion may waive inadmissibility upon approval of a "recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility," Section 212 (d) (3).[23] The Attorney General must make a detailed report to Congress about waivers of exclusion.[24] Section 212 (d) (6).

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[23] The Act of 1950, 64 Stat. 987, 1008-1009, also provided a waiver procedure, as had earlier legislation, see Act of 1917, 39 Stat. 874, 878.

[24] The Immigration and Naturalization Service reports the following with respect to applications to the Attorney General for waiver of an alien's ineligibility for admission under Section 212 (a) (28):

Year	Total Number of Applications for Waiver of Section 212 (a) (28)	Number of Waivers Granted	Number of Waivers Denied
1971	6210	6196	14
1970	6193	6189	4
1969	4993	4984	9
1968	4184	4176	8
1967	3860	3852	8

B. *From the Beginning, This Court Has Recognized That Formulation of Policies Regarding the Admission of Aliens Is Entrusted Under the Constitution Exclusively to the Political Branches of Government*

In prescribing the conditions for allowing aliens to enter the country, Congress acted in accordance with the ancient principle of international law that a nation state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions.[25] This firmly-established principle, dating from Roman times,[26] received recognition during the Constitutional Convention [27] and has continued to be an important postulate in the foreign relations

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[25] See, *e.g.*, *Ekiu* v. *United States*, 142 U.S. 651, 659; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596 (Mr. Justice Frankfurter, concurring); Bouvé, *Exclusion and Expulsion of Aliens*, 4 and n. 3 (1912), and authorities there cited; II Vattel, *Le Droit Des Gens*, §§ 94, 100 (1758).

[26] Borchard, *Diplomatic Protection of Citizens Abroad*, 33, 44-48 (1915).

[27] See 3 *Papers of James Madison* 1277 (1840), where Madison reports Gouverneur Morris' observation during the debates that "every society, from a great nation down to a club, ha[s] the right of declaring the conditions on which new members should be admitted." Article I, Section 9, Clause 1, of the Constitution itself is an implicit recognition of Congress' authority to regulate immigration. In addition, Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, provided that British and American subjects could freely cross the Canadian border. *See Karnuth* v. *United States*, 279 U.S. 231. As to the Colonial understanding of the sovereign's power to control the admission of aliens, see Thomas Jefferson, *Notes on the State of Virginia* 83-85 (Peden ed. 1955).

of this country and the other members of the international community.[28]

Nearly a century ago this Court recognized the power to exclude aliens as inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government and not "granted away or restrained on behalf of any one." *The Chinese Exclusion Case*, 130 U.S. 581, 609. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339. And since the decision in the *Chinese Exclusion Case*, the Court has, without exception, sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123. See, *e.g.*, *Ekiu* v. *United States*, 142 U.S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713; *Lem Moon Sing* v. *United States*, 158 U.S.

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[28] See *Convention Between the United States of America and other American Republics regarding the status of aliens*, Article I, 46 Stat. 2753, 2754 (1928); Constitution of the Intergovernmental Committee for European Migration, 6 *United States Treaties and Other International Agreements* 603, 604 (1955); *Hines* v. *Davidowitz*, 312 U.S. 52; III Hackworth, *Digest of International Law* 725-729 (1942); Hall, *International Law* 211-212 (6th ed. 1909); 4 Moore, *International Law Digest* 151-174 (1906); Borchard, *supra* note 26, at 44-48.

538;[29] *Wong Wing* v. *United States*, 163 U.S. 228, 237; *Li Sing* v. *United States*, 180 U.S. 486, 495; *Fok Yung Yo* v. *United States*, 185 U.S. 296, 302; *The Japanese Immigration Case*, 189 U.S. 86, 97; *United States ex rel. Turner* v. *Williams*, 194 U.S. 279; *United States* v. *Ju Toy*, 198 U.S. 253, 261; *Keller* v. *United States*, 213 U.S. 138, 143-144; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320; *Low Wah Suey* v. *Backus*, 225 U.S. 460, 467-468; *Zakonaite* v. *Wolf*, 226 U.S. 272, 275; *Tiaco* v. *Forbes*, 228 U.S. 549, 556-557; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Mahler* v. *Eby*, 264 U.S. 32, 40; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Hines* v. *Davidowitz*, 312 U.S. 52; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210; *Galvan* v. *Press*, 347 U.S. 522; *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123; cf. *Graham* v. *Richardson*, 403 U.S. 365, 377.

Thus, with respect to the extent of Congress' power in this area, there is, as the Court stated in *Galvan* v. *Press*, *supra*, 347 U.S. at 531, "not merely 'a page of history,' *New York Trust Co.* v. *Eisner*, 256 U.S.

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[29] Mr. Justice Harlan there said: "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." 158 U.S. at 547.

345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." In short, "that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Id.* at 531.

C. *These Decisions Control This Case and Can Be Distinguished Neither on the Basis That Here Exclusion of the Alien Will Deprive People in This Country of the Opportunity to Meet Him in the United States, nor on the Basis That Here the Alien Has Been Denied Entry Because of His Adherence to Communist Political Doctrine*

In this case it is plain that Mandel is excludable under Section 212(a)(28)(D) and (G)(v) and appellees have not argued otherwise (J. App. 8a). Instead, as against the firmly established principle that Congress has exclusive control over the admission of aliens, appellees contend that although an excludable alien cannot force the United States to open its doors, appellees can because they have a "right" under the First Amendment to hear such an alien in person in the United States; they argue therefore that Section 212(a)(28) of the Immigration and Nationality Act of 1952 is unconstitutional because it bars the entry of Mandel and other aliens whom they may wish to confront face-to-face. We submit that this case is governed by the long line of prior decisions of this Court, which we have cited above, see pp. 20-21, *supra*, and that the First Amendment's guarantee of

"freedom of speech" does not, and was never intended to, permit individuals in the United States to compel the entry of otherwise excludable aliens, including Mandel, against the decision of Congress.

In *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, an alien who had entered the country illegally was excluded under the Act of March 3, 1903, 32 Stat. 1213, 1214,[30] as an anarchist. This Court held that even if the alien could be considered an anarchist only in the philosophical sense,[31] he was nevertheless barred from entry because Congress had found that such aliens "would be undesirable additions to our population, whether permanently or temporarily." 194 U.S. at 294. The decision to exclude foreigners and the terms and conditions for permitting them to enter are not matters for judicial inquiry, but are entrusted exclusively to Congress. 194 U.S. at 290-291. The Court rejected Turner's First Amendment challenge to the Act despite the obvious truth "that if an alien is not permitted to enter this country * * * he is in fact cut off from worshipping or speaking or publishing or petitioning in this country * * *." 194 U.S. at 292.

Harisiades v. *Shaughnessy*, 342 U.S. 580, although involving deportation of an alien on the basis of his prior association with the Communist Party, is also quite apposite; plainly Congress can exclude at the

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[30] See p. 15, *supra*.

[31] During his 10 days in the country, Turner gave at least one lecture advocating a revolt by the workers. 194 U.S. at 282-283.

outset aliens that it can require to be expelled after entry. In sustaining the deportation order in *Harisiades*, the Court recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," 342 U.S. at 588-589.[32] Congress, "in exercising the wide discretion that it alone has in these matters," decided in the Alien Registration Act of 1940, 54 Stat. 670—a forerunner of the statute at issue in this case[33]—that former members of the Communist Party should not enjoy the hospitality of this country. 342 U.S. at 595-596. The Court held that the First Amendment did not bar deportation of such aliens and that

> However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers. [*Id.* at 591.]

In his concurring opinion in *Harisiades*, Mr. Justice Frankfurter pointed out that "[e]ver since na-

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[32] See Henkin, *The Treaty Makers and the Law Makers: the Law of the Land and Foreign Relations*, 107 U. Pa. L. Rev. 903, 917-922 (1959).

[33] See pp. 16 to 17, *supra*.

tional States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State" and that United States immigration policy "has been a political policy, belonging to the political branch of the Government wholly outside the concern and competence of the Judiciary." 342 U.S. at 596.

Galvan v. *Press*, 347 U.S. 522, also involved deportation of an alien who had formerly belonged to the Communist Party. The Court found that Congress had a basis for denying alien communists permission to stay in the United States. It pointed to Congress' extensive investigation, which resulted in many findings, including the finding in Section 2(1) of the Internal Security Act of 1950, 64 Stat. 987 (Section 22 of which is the direct source of the statute here at issue),[34] that the

> Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship.

347 U.S. at 529. Noting that Congress' power over the admission of aliens touches "basic aspects of national sovereignty, more particularly our foreign relations and the national security," 347 U.S. at 530, the Court upheld the alien's deportation. The Court

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[34] See pp. 16-17, *supra*.

refused to depart from the "unbroken rule of this Court" and find a constitutional violation in Congress' determination, especially since "those who have been most zealous in protecting civil liberties under the Constitution" had never done so. 347 U.S. at 531-532. See *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (Mr. Justice Holmes: "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 280 (Mr. Justice Brandeis: "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful").

These decisions, as well as the others we have cited above, see pp. 20 to 21, *supra*, control this case. The situation in *Turner* is nearly identical to the situation here;[35] in *Harisiades* and *Galvan*, the Court up-

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[35] The district court refused to follow *Turner* because in *Harisiades* the "Court did not rely upon *Turner* (which was cited to it) nor invoke the argument (made to it) that the power to expel aliens is an attribute of sovereignty essentially relating to foreign affairs and national safety and, therefore, not restricted impliedly by provisions of the Constitution which do not expressly relate to it" (J. App. 15a).

But this Court's failure to cite one of a host of decisions cited to it in *Harisiades* (see Brief for the Government in that case), all of which recognize Congress' plenary power, is of no significance. Congress' exclusive control over what class of aliens should be allowed to enter the United States has been affirmed, without exception, after the *Harisiades* decision, see, *e.g.*, *Galvan* v. *Press*, *supra*; *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123, and only last Term this Court cited *Turner* as an example of Congress' broad authority in this area. *Graham* v. *Richardson*, 403 U.S. 365, 377. The continuing validity of *Turner* has not been undercut.

held deportation of aliens who formerly had been Communists; and in *Galvan*, the Court expressly sustained the constitutionality of Section 22 of the Internal Security Act of 1950, the direct predecessor of the very provision here at issue. (See p. 17, *supra.*)

These cases cannot be distinguished, as appellees propose, on the basis that here the alien's exclusion will prevent them from hearing him in person in this country. That is the obvious consequence anytime any alien is denied entry. It is absurd to suppose that the Court was not astute enough to recognize this self-evident proposition or that it would have decided any of these cases differently if only someone in this country had come forward and asserted his desire to meet the alien face-to-face on American soil.[36]

Nor are these cases distinguishable on the basis that Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, which disqualified Mandel from eligibility for a visa, impermissibly takes account of the alien's political philosophy. The statute upheld in *Turner* barred the entry

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[36] Indeed, the alien in *Turner* had already given one lecture during his illegal sojourn in this country, see note 31, *supra;* unless no one attended, which is most unlikely, it is safe to assume that there were people here who desired to hear him. Yet the Court reaffirmed Congress' plenary power to exclude aliens and, in so doing, stated the obvious: "if an alien is not permitted to enter this country * * * he is in fact cut off from * * * speaking * * * in the country," 194 U.S. at 292.

of aliens who were philosophical anarchists. See also *Ex parte Caminita*, 291 Fed. 913, 915 (S.D.N.Y.) (L. Hand, J.). And the portion of the Internal Security Act of 1950 upheld in *Galvan*, rendered aliens ineligible to come to or stay in the United States even if they had only been past members of the Communist Party. See also *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 595.

Thus, as stated above, in our view these decisions are controlling. "Questions in their nature political," Mr. Chief Justice Marshall stated in *Marbury* v. *Madison*, 1 Cranch 137, 170, "can never be made in this court." And there is nothing in the First Amendment that requires a departure from the constitutional principle, laid down by this Court and affirmed many times for nearly one hundred years, that Congress has the exclusive power to determine which aliens are to be welcomed and that these are matters "wholly outside the concern and competence of the Judiciary."[37] "Freedom of speech" does not carry with it freedom to bring an alien into this country.

[37] *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 596 (Mr. Justice Frankfurter, concurring).

D. *The First Amendment's Guarantee of Freedom of Speech Does Not Include the Right To Bring an Otherwise Excludable Alien Into This Country*

1. *In exercising its plenary power in Section 212 (a) (28) (D) and (G) (v) to make rules for the admission of aliens, Congress did not restrain the freedom of speech of people in this country, but instead restricted only action—the action of the alien in coming into this country*

In *Zemel* v. *Rusk*, 381 U.S. 1, the Department of State refused to validate the passport of an American citizen for travel to Cuba. Rejecting the "contention of appellant that it is a First Amendment right which is involved," the Court observed that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." 381 U.S. at 16-17. "The right to speak * * * does not carry with it the unrestrained right to gather information." *Id.* Significantly, the Court did not say that for purposes of the First Amendment appellant's interest in gathering information in Cuba must be weighed against the government's interest in precluding him from going there. The Court held instead that the First Amendment simply was not involved at all because any inhibition resulting from the refusal to validate passports was an inhibition on action.

Nor is there a First Amendment right involved in this case. In *Zemel* the restriction on travel to Cuba did not impinge on or regulate the freedom of speech of people in this country; they were in no way restrained from discussing Cuban policies or holding certain beliefs about Cuba. Similarly, the

restriction on Mandel's coming to the United States does not abridge appellees' freedom of speech; Section 212(a)(28)(D) and (G)(v) in no way restrains or inhibits them from speaking or publishing.

That statute is directed at controlling the entry of aliens. What appellees have said or written, the people they have associated with and the organizations they have joined, are all irrelevant. The restriction in this case is solely on Mandel's travelling to the United States; it is Mandel's action that is being curtailed. And if, as this Court held in *Zemel*, a limitation on an American citizen's travelling to a foreign country does not deprive him of any right under the First Amendment, still less does restricting the action of an alien by precluding him from entering the country abridge the "freedom of speech" of persons here.[38] In both cases, action not speech is being regulated; in neither case is there any infringement on freedom of expression.[39]

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[38] See Emerson, *Toward a General Theory of the First Amendment* 101 n. 44 (1966) ("The principles [advocated by Professor Emerson] do not fully apply, of course, to the admission of aliens, since they are not yet members of our society. Here the First Amendment would seem to guarantee no protection. The policy which should be adopted on admission of aliens is another matter."). See also *id.* at 88.

[39] *Aptheker* v. *Secretary of State*, 378 U.S. 500, where the Court found unconstitutional in violation of the Fifth Amendment a statute denying passports to members of the Communist Party in this country, is not to the contrary. The Court there held that the statute was overbroad because it did not distinguish between knowing and unknowing members of the Party or their degree of participation in Party activities. 378 U.S. at 510.

[Footnote continued on Page 31]

Similar situations abound. Thus, citizens may wish to inform themselves of prison conditions, but they have no First Amendment right to demand release of a prisoner in order to meet him face-to-face. People here may desire more information about the activities of our military operations abroad, but they have no First Amendment right to require the return of a serviceman stationed overseas. Persons in this country may wish to explore the subjects of polygamy or prostitution or begging or recidivism, but they have no First Amendment right to compel the admission of aliens who are polygamists or prostitutes or beggars or recidivists.[40] And we submit that appellees' desire to inform themselves further about Mandel's Marxist philosophy gives them no First Amend-

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[39] [Continued]

As appellees recognize, however, Mandel has no right to enter this country. Since he obviously has no right of travel under the Fifth Amendment, he cannot complain that Section 212(a)(28) is overbroad and appellees cannot raise that claim on his behalf.

United States v. *Robel*, 389 U.S. 258, is also inapposite. There the Court held that a statute denying members of the Communist Party employment in defense plants violated the First Amendment because such a broad classification deterred associations that were protected under the First Amendment. With respect to Mandel, of course, *Robel* has no application because, as an alien residing in a foreign country, he has no right to freedom of speech or association here. And with respect to the other appellees, *Robel* is also inapplicable because the exclusion of Mandel and other aliens under Section 212(a)(28) in no way deters appellees from joining whatever organizations they wish or from speaking about or publishing whatever they please.

[40] These classes of aliens are ineligible for visas. See 8 U.S.C. 1182(a)(8), (10), (11) and (12).

ment right to compel his admission into the United States.

As in all of the foregoing examples dealing with aliens or other persons seeking to travel to a potential audience, under Section 212(a)(28) the reason why the alien seeks entry is immaterial. He is excluded regardless of whether he wishes to come for business or for pleasure or to give lectures. On the other hand, if as appellees argue, his admission to the United States should depend upon whether he has an audience waiting here, then the power to decide what aliens should enter the country is transferred to any individual citizen or group of citizens who might claim that they would like to confront the alien in person, whether temporarily or permanently. As *Zemel* indicates, the First Amendment cannot be relied upon to support such a result.[41]

This is why *Lamont* v. *Postmaster General*, 381 U.S. 301, decided shortly after *Zemel*, is inapposite. Under the procedure at issue in *Lamont*, the Post Office detained foreign mailings of "communist political propaganda" until the addressee returned a card re-

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[41] The college speaker-ban cases, such as *Brooks* v. *Auburn University*, 412 F.2d 1171 (C.A. 5), are thus not in point. Those cases do not hold that when, as in this case, the potential speaker has no right to travel to his audience, the First Amendment nevertheless requires that he be permitted to do so because people would like to hear him in person. Instead, those cases deal with regulations impinging upon freedom of speech in areas where speakers within the country traditionally have a right to be—the campus of public universities. See Van Alstyne, *Political Speakers At State Universities*, 111 U.Pa.L.Rev. 328, 338-339 (1963).

questing delivery of the material. The Court rested its decision "on the narrow ground" that imposing this affirmative obligation on addressees had a "deterrent effect, especially as respects those who have sensitive positions" and would likely inhibit people in sending for such literature.[42] 381 U.S. at 307. Unlike *Lamont*, appellees in this case are not deterred from expressing their views or inhibited from holding whatever beliefs they please. The regulation in question is directed at the admission of aliens; action, not speech, is being regulated; and the action is that of an alien. In short, freedom to compel the admission of an alien whom Congress has determined to be ineligible for entry is not comprehended within the guarantee of "freedom of speech."[43] Appellees' argu-

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[42] Mr. Justice Brennan concurred on the basis that "the protection of the Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful" and that "the right to receive publications is such a fundamental right." 381 U.S. at 308.

[43] To hold otherwise would be to say that during the nearly one hundred years in which this Court has repeatedly upheld Congress' exclusive authority to determine whether to exclude aliens, the guarantees of the First Amendment have not been fully meaningful. If anything, technological developments over the years have minimized whatever impact exclusion of an alien might have had on his ability to get his views aired in this country. Mandel, for example, tape recorded his speech entitled *Revolutionary Strategy In the Imperialist Countries*, which he intended to deliver during his visit here, and had the speech presented to an audience in New York (App. 5). He also addressed the audience through a trans-Atlantic telephone hook-up (App. 30). Moreover, books and articles written by Mandel and

ment that excluding Mandel prevents him from speaking here in person and thus prevents appellees from hearing him in person is precisely the kind of argument this Court had in mind in *Zemel* when it said that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." 381 U.S. at 16-17.

In sum, the prior decisions of this Court sustaining Congress' plenary power to control the admission of aliens; the Court's repeated holdings that these are not matters for judicial inquiry but are entrusted exclusively to the political branches of government; the impossibility of distinguishing these decisions on the basis that here exclusion has the effect of preventing people in this country from meeting the alien in person; the fact that Section 212(a)(28) regulates the action of an alien and does not restrain people here from speaking or publishing or organizing or believing in whatever they please—all this leads to the conclusion that the guarantee of "freedom of speech" in the First Amendment does not mean that a person in this country can require the admission of an alien, such as Mandel, whom Congress has determined to be ineligible for admission to the United States.

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others on the topic of Marxism are freely sold and distributed within this country both for private use and for study within many universities (App. 54, 87). "Teachers and students [within this country] * * * remain free to inquire, to study and to evaluate" the merits of these teachings. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250.

2. *Section 212 (a) (28) (D) and (G) (v), which rests upon considerations of foreign policy and national security, represents a legitimate exercise of Congress' exclusive authority to decide what aliens should be entitled to the hospitality of this country and can be revised only by international diplomacy or new legislation.*

The district court, however, disregarded this Court's prior decisions and refused to recognize that Section 212(a)(28) is directed at the action of an alien because (J. App. 13a-14a)

> there is not here any distinct aim of the exercise of * * * [the power to exclude aliens] that is primary and to the attainment of which the restraint of First Amendment interests is sacrificed in a secondary or mediating exercise of [that] power.

Apparently the court meant, as it stated later in the opinion, that the provisions at issue "do not reflect a genuine exercise of the implied power of alien exclusion" (J. App. 26a).

To the contrary, when Congress barred the entry of aliens "who advocate the economic, international, and governmental doctrines of world communism" in 1950[*] and carried these provisions forward in Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, it in fact performed a function entrusted solely to the political branches of government, a function touching "basic aspects of national sovereignty, more particularly our foreign relations and the national security." *Galvan* v. *Press*, *supra*, 347 U.S. at 530. These very provisions are an

[*] Internal Security Act of 1950, 64 Stat. 987.

expression of the foreign policy of the United States[45] and are also based on considerations of national security.

There can be no doubt that here, as elsewhere in laws regarding the admission of aliens,[46] Section 212 (a) (28) (D) and (G) (v) "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588-589.[47] Section 212 (a) (28)[48] manifests to the rest of the international community this country's opposition to the world communist movement and continues to serve as a lever for negotiating with other nations reciprocal privileges for American citizens. Indeed, opponents of this provision based their disapproval on the "delicate problems in the conduct of foreign relations", that, in their view, would result, particularly with respect to Spain, Argentina and Yugoslavia.[49]

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[45] See authorities cited at p. 20, *supra*; see also Kingsley, *Immigration and Our Foreign Policy Objectives*, 21 Law and Contemporary Problems 299 (1956).

[46] See authorities cited in note 28, *supra*.

[47] See also cases cited at pp. 20 to 21, *supra*.

[48] See also 8 U.S.C. 1182 (a) (27).

[49] S. Rep. No. 2369, Part 2, 81st Cong., 2d Sess. 1, 15 (1950) (Minority Report):

> Presumably, the interests of the United States require that Spanish and Argentine nationals be permitted to enter the United States for the usual purposes. To forbid it, will create much ill will and invite swift retaliation.
>
> It should be realized that these provisions would rigidly exclude from the United States all Yugoslav

If the foreign policy represented by Section 212(a)(28) is to be changed, this is a task for the political branches of government, either through revision of the immigration laws or through international diplomacy.[50] As Mr. Justice Jackson said for the Court in *Harisiades, supra*, 342 U.S. at 591, "[i]t should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal [51] without obtaining for American citizens abroad any reciprocal privileges or immunities."

Moreover, considerations of national defense also entered into Congress' decision to bar the entry of aliens within Section 212(a)(28). Congress had found, after years of investigation, that communism represented a world-wide revolutionary movement designed to establish a totalitarian dictatorship through espionage, deceit and treachery. See p. 25, *supra;* S. Rep. No. 1515, 81st Cong., 2d Sess. 781-801 (1950).

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nationals supporting the Tito regime. The independent policy of Yugoslavia under Tito is a major barrier to Soviet expansion and aggression in southern Europe. In view of present world political conditions, we believe that it is essential to leave the Secretary of State and the Attorney General with discretionary power to deal with special situations in the interest of the United States.

[50] A subsequent treaty, of course, supercedes a prior act of Congress. See generally Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation,* 56 Colum. L. Rev. 1151, 1170 (1956).

[51] See 8 U.S.C. 1253(g), empowering the Secretary of State to discontinue issuing visas to nationals or residents of countries that refuse to accept deportees. This sanction has been invoked with respect to certain Iron Curtain countries. See Gordon & Rosenfield, note 11, *supra,* at 3-56 to 3-57.

In *Galvan* the Court held that in light of these findings Congress was entitled to determine that aliens, because of their past adherence to the doctrines of communism, should not be entitled to the hospitality of the United States. Congress was not limited to refusing admission to only those particular aliens who advocated violent overthrow of the government.[52] With more than 200 American Consuls throughout the world granting more than three-quarters of a million nonimmigrant visas per year,[53] such a limitation might have created intolerable burdens, involving not only difficulties of investigation and proof, but also delicate foreign relations questions about the propriety of the United States investigating citizens of a foreign country in their homeland. "Congress, exercising the wide discretion that it alone has in these matters, declined to accept that as the Government's burden." *Harisiades, supra*, 342 U.S. at 596.[54]

In light of the foreign relations and national defense policies that Section 212(a)(28)(D) and (G)(v) embodies, the district court erred in holding that Congress had not genuinely exercised its plenary power to exclude aliens. As this Court has held from the beginning, these are matters that the Constitution entrusts to Congress, not the courts. Even if a rational basis were needed to sustain its action, here

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[52] Compare *United States* v. *Robel*, 389 U.S. 258, 265-266.

[53] Gordon & Rosenfield, note 11, *supra*, at 1-69, 3-65.

[54] Cf. *Zemel* v. *Rusk*, *supra*, 381 U.S. at 17 ("Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas").

Congress had ample justification for excluding aliens within the class to which Mandel belongs. Whether a particular legislative exception should be made for Mandel [55] or, indeed, whether a general revision of Section 212(a)(28) should be undertaken in light of international developments, are matters for Congress to determine. The First Amendment's guarantee of freedom of speech does not include the power to require the admission of an alien Congress has refused to admit and it does not confer authority on appellees to determine which aliens should enter the country.

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[55] See, *e.g.*, Report to the Senate Committee on the Judiciary of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, *Visa Procedures of Department of State*, 87th Cong., 2d Sess. (Committee Print, 1962); Priv. L. No. 380, 68 Stat. A57 (1954) (private bill granting asylum to Communist aviator who flew his plane to the West).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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